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Docket No. 98-224

IN THE UNITED STATES SUPREME COURT

HARRY K. SINGLETARY,
Secretary, Florida Department of Corrections,
Petitioner,

v.

HAROLD SNOWDEN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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PRELIMINARY STATEMENT

The state has not identified any reasons why certiorari should be granted. The state has made no claim that this case represents a split in the federal circuits, or a conflict with a state court of last resort. There is no claim that the Eleventh Circuit has departed from the accepted and usual course of judicial proceedings. The state has not claimed that the Eleventh Circuit in this case decided and important question of federal law that has not been, but should be, settled by this Court, or that the Eleventh Circuit has decided an important federal question in a way that conflicts with relevant decisions of this court. Accordingly, the state has not asserted any of the reasons for granting a writ of certiorari set out in Rule 10 of the Rules of the Supreme Court.

In its petition for certiorari, the state has claimed only that the Eleventh Circuit did not have a sufficient basis to decide the appeal in this case. In fact, the Eleventh Circuit applied this Court's decisions -- *Duncan v. Henry*, 513 U.S. 364, 115 S.Ct. 887 (1995) and *Picard v. Connor*, 404 U.S. 270, 92 S.Ct. 509 (1971) -- to its review of the record on appeal in this case "including the trial transcript, Snowden's direct appeal brief, Snowden's petitions for post conviction relief, and the district court's order" and found that the issue on which the case was reversed - and several other issues -- was "exhausted in the Florida state courts. *Snowden v. Singletary* 135 F.3d 732 (11th Cir. 1998)

As the Eleventh Circuit applied the relevant decision of this Court in deciding this case -- and indeed relied on those decisions in reaching its conclusions -- the basis of the state's claim at this juncture is revealed to be nothing more than that the state is unhappy with the outcome of the case. This is not a basis for granting a writ of certiorari.

STATEMENT OF FACTS

The Events Which Precipitated this Case

Mr. Snowden was a highly decorated police officer. Mr. Snowden's wife cared for neighborhood children during the day. In 15 years, there was never an incident or complaint involving a child until August 1984 when Greg Wilkes, a three year old child, began to arrive at the Snowdens' bearing welts and signs of having been beaten. The Snowdens confronted his parents, warning them that they would contact the authorities to report child abuse. Immediately, Mr. Wilkes leveled accusations against Mr. Snowden. The prosecutor opened an investigation, but was unable to find evidence to secure an Information. (Exh.2 -201-202) No charges were filed.

The Investigation in This Case

The prosecutor turned its investigation to other children cared for by Mrs. Snowden. Initial interviews yielded exculpatory results. The state intensified the investigation, using coercive tactics on more children, eventually garnering claims of abuse. (Exh.5 -1084, 1140,1142)

Two trials resulted. The first involved an eleven year-old girl. Intense questioning by state investigator Laurie Braga and the child's mother resulted in abuse allegations. At trial, the state presented testimony of the child and her mother. There was no medical evidence. Mr. Snowden was acquitted.

The prosecutor was not satisfied. Immediately after his acquittal, Mr. Snowden was tried again.[1]

1

In the second trial, the court suppressed from the jury that the investigation into Mr. Wilkes' allegations was closed and that Mr.

The Instant Case

The Prosecution's Case

The prosecution presented its case in four parts: testimony of the child complainant, Leslie Blandes; expert testimony of purported medical evidence and the truthfulness of Leslie's testimony; hearsay testimony; and alleged prior acts claims.

Testimony of Leslie Blandes

The Genesis of Leslie's Accusations and Trial Testimony

When Leslie's mother first heard Mr. Wilkes' accusations, she asked Leslie on two occasions whether Mr. Snowden touched her. Both times Leslie insisted she had not been touched. (Exh.5 -1144-45) But, Mrs. Blandes took Leslie to the prosecutor's office to be interviewed by Laurie Braga, who was retained there to interview children suspected of being abused. (Exh.5 -1075)

Analysis of the transcript of Braga's interview with Leslie reveals the girl had nothing to say about sex until Braga: provided her with every bit of sexual information that the child ever uttered; lied to her; told her other children reported abuse; confused her by mixing fact with pretend; encouraged abuse fantasy; and refused to accept claims that she was not abused.

Since this case, the methods Braga used to extract claims of abuse have been shown to undermine reliability of children's statements and supplant actual memories. Effects of this

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Snowden was acquitted in the first trial.

coercion have been shown to be long lasting, if not permanent.[2]

When the Braga interview began, Leslie's only complaint about Mr. Snowden was that he turned the television off so he could sleep. (DE.19 -1st supp.Exh.A,p. 9) Braga was not satisfied, so she suggested sexual activities:

> ...the reason that I'm asking you these questions is that some children came and talked to me and talked to me about a grownup touching them here and taking their clothes off and doing something with their penis, and so I needed to talk to you to find out what happened to you. So that's why I'm asking you the questions. (DE19 -1st supp. Exh.A p.31)

Thus Braga made the first mention of sex, touching, clothes off and a penis.

Braga pursued her own suggestions, asking what "really happened" until she made Leslie offer that Mr. Snowden *wanted* to touch her, but she said "no." (DE.19-1st supp.Exh.A p.32-33) Though Leslie said nothing happened to her, Braga steadfastly rejected Leslie's claims of non-abuse.

Braga continued, upping the pressure and using anatomical dolls to encourage Leslie to *pretend*: "let's pretend this is you, this is Leslie okay, and this is Grant. Show me with the dolls what happened." "Did Janice ever leave you and John alone with Grant?" "And did Grant take his clothes off?" "And what

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[2] *See e.g.*, Ceci & Bruck, *Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony* (Wash. D.C., Amer.Psych.Assoc. Press (1995). For review of literature showing effects of suggestion on children's memory in a legal context *see State v. Michaels*, 625 A.2d 489 (1994) and 642 A.2d 1372 (1994).

did he do after he took his clothes off?" Leslie had no response. (DE.19 -1st supp.Exh.A p.38)

Playing with a doll, Leslie lifted dress up and put her finger inside the hole representing the vagina. Braga quickly named the doll Leslie and asked if Mr. Snowden put anything else into her vagina. "What's inside?" Leslie asks. "This is what I want to ask you," Braga said. "We're going to pretend this is you; right? And you said that he put his finger inside; right? Did he ever put his penis inside or just his finger?" (DE.19 -1st supp.Exh.A p.41) There, Braga made the first mention of abuse, *i.e.*, putting his finger and penis into her vagina. Braga used the doll for more leading questions about sexual contact:

> Did he put his penis -- *let me show you*. Did he rub his penis outside or put it inside?...did he ever put his penis anywhere else? Did he put his penis here, or did he put his penis here, or did he put his penis in your mouth, where else?

(DE.19-1st supp.Exh.A p.42) There, Braga made the first mention of a penis in the child's mouth. " What happened when he put his penis in your mouth? What happened then?" "Did something come out of his penis?" The child shook her head, no, but Braga refused to accept this, pursuing her theory further: "Now when you said it tasted yucky, what tasted yucky, his penis, or was it wet? Leslie repeated, "it was wet." So Braga suggested: "Did you think maybe like he peed in your mouth or something? (DE.19-1st supp.Exh.A p.43).

Leslie as a Witness at Trial

Every single sexual allegation made by Leslie was first suggested to her by Braga. The prosecutor elicited Braga's suggestions from Leslie by repeating Braga's leading questions (*i.e. "Did Grant put something in your mouth to make something wet in your mouth?"*). Leslie revealed rehearsal of

her testimony, answering questions out of order and providing a response to a question not yet asked. (Exh.5 -933-936)

Leslie said she met with prosecutors twelve or thirteen times to talk about Mr. Snowden. Each time, they told her to say "Grant touched [her] in [her] pee-pee" and she got better at telling her story each time she met with them. (Exh.5 -950)[3]

The defense was prohibited from cross-examining Leslie about whether she might have learned about sex from a source other than Mr. Snowden. (Exh.2 -215) The court suppressed questioning about an older boy in Leslie's neighborhood who had been arrested for a sex crime against younger children, *even though Leslie complained of being "bothered" by him.* (Exh.2 -216)

Expert Testimony

Immediately after Braga extracted the first statements of abuse from her, Leslie was taken to Dr. Dorothy Hicks, at Jackson Memorial Hospital. (Exh.5 -1076; Exh.7 - 798)

Dr. Hicks testified that her hymen was intact. Culture tests for gonorrhea were negative.[4] Thus, the objective portion of Dr. Hicks' examination resulted in findings that the occurrence

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3 Leslie revealed other adult pressure on her. Her mother told her to "talk about Grant" and say that he "touched [her] pee-pee." Her expressions also show adult influence."Grant would just be walking around loose, doing it to other kids," she learned from prosecutor Pohl. "If Grant walks around loose, he'll do it to other kids," came from her parents. She also learned: "Grant is going to stay away from little kids for a long time."

4 Culture tests from Leslie's brother were negative. (Exh.7 -1884)

of the acts of penetration which Braga suggested to the child was unlikely, if not impossible. (Exh.7 -1798-99,1876, 1883)

During the examination, Dr. Hicks noted moisture around Leslie's vaginal area. (Exh.7 -1798-99) Her mother testified that this condition was present on Leslie since *before* she met the Snowdens. (Exh.7 - 1146,1949-50) However, Dr. Hicks used the moisture to provide a diagnosis of gardnerella vaginitis, a condition which can be transmitted from child to child through unwashed clothing from someone with the condition, through skin contact, or through sexual contact. (Exh.7 -1809,1875,1880-81)

Dr. Hicks' was familiar with several objective and reliable processes to test for gardnerella (Exh.7 -1807,1861,1863, 1865), however, instead of using any of these tests, she placed a sample of the moisture on a microscope slide and claimed to have detected "clue cells" which, she said, indicated gardnerella. (Exh.7 -1805-07,1861-63,1865)

Dr. Hicks' diagnosis was admittedly incomplete. She conceded the need for "clue cells" *and* an odor particular to gardnerella to establish a diagnosis. However, she did not note an odor. (Exh.7 -1807, 1858,1860) She also conceded she was biased toward a positive diagnosis. (Exh.7 -1905-06) Dr. Hicks immediately destroyed the slide and treated Leslie for the condition. (Exh.7 -1769,1886,1906)

The court also prevented the defense from confronting Dr. Hicks' conclusions. Dr. Max Bertholf was a defense expert in the accuracy of diagnoses of vaginal and venereal diseases. (Exh.8 -2013-57) Out of the jury's presence, he explained that the presence of "clue cells" were not indicative of gardnerella. (Exh.8 -2052-55) He explained that the test used by Dr. Hicks "is a poor test" and "a sloppy test...[which] at best...may be 50 percent accurate." (Exh.8 - 2032-33) The court prohibited this

testimony from reaching the jury by ruling that he was not an expert in diagnosing sexually transmitted diseases *in children.* It was of no moment to the court that the record is devoid of any suggestion that such a specialty exists. In fact, the only comment about such a specialty was Dr. Bertholf's unrefuted statements that *there is no such specialty*, the "same test applies to everyone, " and "there are not two separate tests for clue cells." (Exh.8 - 2025,2032-35,2056-7)

Dr. Simon Miranda testified as an "expert in child sexual abuse cases" and "the psychology of denial by a child." (Exh.5 -1199) Dr. Miranda interviewed Leslie after Braga. (Exh.6 - 1224-25) He told Leslie his job was to talk with children about problems, things that may have happened to them, and that worry them. He asked what happened to her. (Exh.6 -1228) He testified she was reluctant to allege abuse, but that he pressed Leslie, using anatomical dolls to extract abuse allegations.[5] (Exh. 6 -1258-64) Leslie then told him, "I don't know the rest of it" and "I don't know no more." (Exh.6 -1258)

Dr. Miranda vouched for the truth of Leslie's allegations, telling the jury that only 5 of 1,000 children fabricate claims of abuse. (Exh.6 -1302-08) The prosecutor used this bolstering in summation, reminding of Dr. Miranda's claim "that 99.5 percent of the children who report an incident of abuse are telling the truth." (Exh.8 -2358)

Laurie Braga testified as an expert in child development, patterns of disclosure by abused children, and interview techniques of abused children. (Exh.8 -2239) She vouched for the truth of Leslie's allegations, testifying that a child cannot fabricate sexual abuse, that children cannot be brainwashed, and that she could not make a child say something that is not

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[5] Dr. Miranda conceded to prompting Leslie. (Exh.6 -1224)

true. (Exh.8 -2266) She testified that Leslie's "pattern of disclosure" was consistent with sexually abused children." (Exh.8 -2270)[6]

Hearsay

The state presented massive amounts of hearsay through adult witnesses. Leslie's mother repeated what Leslie said after the Braga interview. (Exh.5 -1096) Dr. Miranda repeated statements garnered during his examination after the Braga interview. (Exh. -6 1252,1258-64) Braga testified about comments she elicited from Leslie. (Exh.8 -2261-62) Dr. Hicks told about abuse-related comments made by *Leslie's mother* after the Braga interview. (Exh.7 -1811)

Alleged Prior Bad Acts

The state presented enormous amounts of alleged prior bad acts evidence through two children. Defense objections were overruled. (Exh.6 -1351, 1354-55,1367-68)

Greg Wilkes had been subjected to a Braga interview. He testified that "one time," Mr. Snowden told him to put his mouth on Mr. Snowden's penis, and Mr. Snowden put his mouth on the child's penis. (Exh.6 -1378)

Greg's mother repeated alleged out of court statements. (Exh.6 -1416-83)

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6 Scientific literature and courts in a growing number of jurisdictions agree that there is no pattern of behaviors or diagnostic indicators of abuse. *e.g.*, Meyers, *Expert Testimony in Child Sex Abuse Litigation*, 68 Neb.L.Rev. 1, 61,67 (1989); *State v. J.Q.*, 617 A.2d 1196 (N.J. 1993); *State v. Cressy*, 628 A.2d 696 (N.H. 1993); *Commonwealth v. Dunkle*, 602 A.2d 830 (Pa. 1992).

Medical testimony revealed no indications of abuse on Greg. A positive gonorrhea test was proven wrong when a confirmatory test was negative. (Exh.2 -225-227)[7]

Psychologist Kate Adler testified that after seeing Greg she felt compelled to warn Mr. Wilkes to stop pressuring Greg to say that Mr. Snowden put his penis in the boy's mouth. (Exh.7 -1939-41) Mr. Wilkes did not heed the doctor's admonitions. Greg testified at trial that his father reminded him to say that he had put his mouth on Mr. Snowden's penis. (Exh.6 -1391, 93)

Medical examinations of six year-old Karen Marks revealed no signs of abuse. (Exh.6 -1593-94, 1600-01) Karen had never spoken of sex or abuse until she was subjected to a Braga interview in which Braga used the same coercive tactics that were successful with Leslie. (Exh.6 -1576-79) In response to the prosecutor's leading questions, Karen testified that, "Grant touched me."She said other children were sleeping in the kitchen when Mr. Snowden put his penis "inside" her "front" and "back." (Exh.6 -1536-7,41)

Sentencing

Mr. Snowden received five life sentences, one running consecutive to the other four. (Exh.9 -2510-11)

Post Conviction State and Federal Proceedings

In 1987 -- following his conviction and imposition of five life sentences -- Mr. Snowden appealed to the Florida Third District Court of Appeals. He addressed several errors including: use of alleged "other crimes" evidence; destruction

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7 The alleged "positive" sample was thrown away prior to trial. (Exh.6 -1692-94)

of evidence; denial of confrontation state experts; improper use of hearsay; a state witness who opined that defense counsel "abused" the child witness; prosecutorial misconduct; and prohibition on inquiry into juror bias.

Affirming the conviction, the appeals court did not discuss errors presented, other than one concerning alleged prior bad acts. *Snowden v. State*, 537 So.2d 1383 (1989). In April 1989, the Florida Supreme Court declined to review Mr. Snowden's appeal. *Snowden v. State*, 547 So.2d 1210 (1989). In 1991, Mr. Snowden filed a state post conviction relief motion. His arguments included: ineffective assistance of counsel, judicial bias, the state's failure to prove its case, the defense's inability to present a defense, use of an expert to corroborate and vouch for the child's accusations. Relief was denied.

Mr. Snowden's petition for a writ of habeas corpus in the United States District Court for the Southern District of was denied in February 1994 (Nesbitt). The district court acknowledged errors, but found them not "to deny fundamental fairness..." (Exh.1-2-9,10,11) A Certificate of Probable Cause was denied by the district court. The circuit court granted Mr. Snowden's request for a Certificate of Probable Cause on October 3, 1995. (Kravitch)

Mr. Snowden's appeal was granted on February 18, 1998. A state motion for rehearing and rehearing en banc was denied on May 4, 1998. A state motion to stay the mandate was denied on June 17, 1998.[8]

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[8] The district court has not issued the writ. Mr. Snowden filed a petition for writ of mandamus in circuit court on August 7, 1998. On August 14, 1998, the state filed in this Court a "motion to stay enforcement of the judgment of the United States Court of Appeal for the Eleventh Circuit." That motion was denied on August 19, 1998.

ARGUMENT

CERTIORARI SHOULD BE DENIED BECAUSE THE STATE HAS FAILED TO IDENTIFY ANY REASON THAT THIS COURT SHOULD REVIEW THE DECISION OF THE ELEVENTH CIRCUIT.

1. The Eleventh Circuit Granted Habeas Corpus Because Of The State's Unconstitutional Use Of Expert Testimony To Secure A Conviction.

In a unanimous decision, the Eleventh Circuit granted Mr. Snowden's petition for habeas corpus on appeal because of the state's use of an expert witness to testify that the child's accusations were true.[9] Specifically, the circuit court wrote:

> The case against Snowden was based almost entirely upon the stories told by three, young-children witnesses. The oldest, allegedly abused child (and the oldest child witness) was 6 years old at the time of trial; the abuse had supposedly occurred, at least, two years before the trial. The only physical evidence was that one of the children had been treated for an ailment which can be transmitted sexually, but is also transmitted by other means.
>
> And this case is not one in which the prosecution's expert's view of victim credibility was touched on only briefly at the trial. In the prosecutor's argument to the jury, he stressed the significance of the expert's opinion about the credibility of child victims of supposed sexual abuse. Over and over again, the prosecutor hit the point hard, saying this among

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[9] The circuit court wrote, "We need go no further than to address the claimed error of permitting an expert witness to testify about the credibility of other witnesses." (State petition p. A11.)

other things about Dr. Miranda's trial testimony:

> Dr. Miranda is a witness who is a real expert in this case.... He is a real expert....
>
> He told you that out of those 1,000 kids [the 1,000 Dr. Miranda had said he had interviewed about sexual abuse], 995 of them told the truth.... That's 99.5 percent of the children.... He said in 99.5 percent of those cases it has been his experience that the children have been telling the truth....
>
> ... That's the opinion of Dr. Simon Miranda. 99.5 percent of the kids tell the truth....
>
> [Dr. Miranda concluded] that ... there was no evidence that the girl made up the entire story ....
>
> ... And remember, if you don't remember anything else about Dr. Miranda's testimony, just remember two things: That he was qualified as an expert in child sexual abuse 250 times, and that it is his experience that 99.5 percent of the children who report an incident of sexual abuse are telling the truth.

(State petition A11-12) Considering the expert's testimony and the prosecutor's use of it, the circuit court held:

> A denial of fundamental fairness occurs whenever the improper evidence "is material in the sense of a crucial, critical, highly significant factor. *Osborn v. Wainright*, 720 F.2d 1237, 1238 (11th Cir. 1983)....
>
> That [evidence such as Dr. Miranda's testimony] is improper, in both state and federal trials, can hardly be disputed. *See, e.g. United States v. Azure*, 801 F.2d 336,

340-41 (8th Cir. 1986)(expert testimony about credibility of alleged-child-sexual-assault victim improperly invades the province of jury, which "may well have relied on [the expert's] opinion and surrendered their own common sense in weighing testimony")(internal quotation marks and citation omitted); *Tingle v. Florida*, 536 So.2d 202, 205 (Fla.1988)("error for the state's witnesses to directly testify as to the truthfulness of the victim; .... the ultimate conclusion as to the victim's credibility always will rest with the jury")....

(State petition A11-12.)[10] The circuit court concluded:

> The jury's opinion on the truthfulness of the children's stories went to the heart of the case. This circumstance makes Snowden -- against whom there was, otherwise, very little evidence -- deserving of relief.... Permitting an expert to vouch forcefully for the children's credibility in this case was a "crucial, critical, highly significant factor." In addition, there was no adequate means to counter such a contention: it truly was this expert's opinion that child witnesses in sexual abuse cases tell the truth....
>
> Witness credibility is the sole province of the jury. Very rarely will a state evidentiary error rise to a federal constitutional error; but given the circumstances of the trial underlying this case, we conclude that allowing expert testimony to boost the credibility of the main witness against Snowden -- considering the lack of other evidence of guilt -- violated his right to due process by making his

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Tingle v. Florida was cited and relied on by Mr. Snowden in the Florida courts. It is important to note this because the state claims in its petition for certiorari that the Eleventh Circuit did not cite cases relied on by Mr. Snowden in state court.

criminal trial fundamentally unfair...

(State petition A13-14, case citations omitted.)

2. The Eleventh Circuit Held That The Issue On Which It Granted Mr. Snowden's Appeal -- And Other Issues -- Was Properly Exhausted In State Court Pursuant Relevant Decisions Of This Court.

Deciding that the unconstitutionality of the state expert's vouching testimony was properly exhausted in the Florida state courts, the Eleventh Circuit expressly applied the rules of law set forth by this Court in *Duncan v. Henry* 513 U.S. 364, 115 S.Ct. 887 (1995), *Anderson v. Harless*, 459 U.S. 4, 103 S.Ct. 276 (1982), and *Picard v. Connor* 4304 U.S. 270, 115 S.Ct. 509 (1971). (State petition p. A6) Guided by those cases, the circuit court examined the entire "record on appeal, including the trial transcript, Snowden's direct appeal brief, Snowden's petitions for state post-conviction relief, and the district court's order." Pursuant to its review of the record according to the rules set forth in this Court's cases, the Eleventh Circuit made the factual finding that the issue on which Mr. Snowden's appeal was granted was exhausted in the Florida state courts. (State petition p. A7)

There are several places in the record which evidence that the constitutional implications and nature of the state's vouching testimony was made clear to state courts. As the Eleventh Circuit noted, in his direct appeal Mr. Snowden wrote: "by permitting improper expert testimony to bolster [the child's] credibility -- a clear invasion of the jury's sole province -- Mr. Snowden was denied a fair trial. Snowden's Direct Appeal Brief at 56." (State petition p. A7) With this statement and the section of the direct appeal brief in which it was contained, Mr. Snowden alerted the state court that Mr. Snowden was denied the due process of a fair trial. He also

alerted the court to how the violation of due process occurred -- *i.e.* the state expert's invasion of the province of the jury by vouching for the truth of the accusations against Mr. Snowden. According to even the state's interpretation of this Court's holdings regarding exhaustion, the Eleventh Circuit had jurisdiction to decide the issue in this case.[11]

Mr. Snowden also presented the federal constitutional aspects of the vouching testimony in his Florida post-conviction relief petition. (PCR 38-43) (RA1-5)[12] In his petition, Mr. Snowden cited state cases adopting federal constitutional analyses regarding vouching testimony. Specifically, Mr. Snowden cited *Tingle v. State*, 536 So.2d 202 (Fla. 1988), in which the Florida supreme court adopted federal constitutional principles prohibiting bolstering testimony, and *Fuller v. State*, 540 So.2d 182 (Fla. 5th DCA 1989), holding that bolstering testimony violates fundamental fairness. (RA3)[13]

11

In its petition for certiorari, the state argues that according to this Court's decisions, "a due process claim is fairly presented to a state court when the claim specifically states not only that the due process clause of the Fourteenth Amendment was violated, but also how it was violated." (State petition, p. 11) Under this definition, the Eleventh Circuit properly found Mr. Snowden exhausted his claim.

12

"RA" cites refer to respondent's appendix, attached hereto.

13

The state notes in its petition for certiorari that "Snowden's defense counsel could have made it very clear that he was claiming a due process violation by simply citing to *United States v. Azure*, 801 F.2d 336 (8th Cir. 1986) which case [sic] was cited by the Florida Supreme Court in *Tingle v. State*...for the proposition that the expert testimony testify [sic] about the credibility of an alleged child sexual assault victim improperly invades the province of the jury." (State petition p.

It was pursuant to this Court's decisions that the Eleventh Circuit considered the record in this case and found that Mr. Snowden's habeas corpus claims were exhausted. For this reason, there is no basis for the state's petition for certiorari.

3. The State's Claim That The Eleventh Circuit Made An Incorrect Factual Finding Regarding Mr. Snowden's Presentations To Florida Courts Is Incorrect And Does Not Meet The Requirements For Certiorari.

As noted, *supra*, the Eleventh Circuit's finding that Mr. Snowden exhausted the issue of the vouching testimony in the Florida courts is supported by the record. The Eleventh Circuit was careful in reviewing the record in accordance with this Court's decisions in *Duncan*, *Anderson*, and *Picard*. It was pursuant to this review that the circuit court rendered its factual finding that the issue was exhausted.

In light of the express language in the circuit court's decision explaining that the court followed the teachings of this Court's cases, the state's petition for certiorari is revealed to be a simple complaint that the circuit court was wrong.[14] This

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18) As noted, *Tingle* was cited in Mr. Snowden's Florida post conviction relief petition. It was also cited in the Eleventh Circuit's decision.

14

The state also implies that while Mr. Snowden may have alerted Florida courts to the federal constitutional issue, his presentation was somehow quantitatively insufficient to satisfy exhaustion requirements. (State petition, p. 12 ("[the circuit court] found...one sentence in defense counsel's seventy page brief sufficient to have alerted the state court that Snowden was asserting that the evidentiary ruling under attack denied him the due process of law guaranteed by the Fourteenth Amendment).) We note that this Court has never established quantitative requirements. The circuit court expressly

is not a reason for granting certiorari.

4. The State's Arguments Regarding The "Essentially The Same Standard" Are Irrelevant To This Case.

The state argues that the "essentially the same" standard articulated in *Tamapua v. Shimoda*, 796 F.2d 261 (9th Cir. 1986) cannot serve as a basis for the Eleventh Circuit's decision in this case. (State petition, pp. 13-16)

As noted, *supra*, the Eleventh Circuit found that Mr. Snowden alerted the Florida courts to the constitutional nature of the issues presented. Thus, the circuit court's decision was not based on an "essentially the same" standard. The state's argument is, therefore, merely an attempt to conjure an issue that might entice this Court to grant certiorari.

The state has not presented any reasons why certiorari should be granted. Accordingly, the state's petition should be denied.

CONCLUSION

For all these reasons, and because the state has failed to identify any reason why certiorari should be granted, Mr. Snowden respectfully requests that the state's petition for certiorari be denied in its entirety.

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reviewed the entire record of this case in the context of this Court's decisions. Pursuant to this review, it found Mr. Snowden's state court presentations to have been sufficient. The state has not indicated any legal fault with the Eleventh Circuit's determination.

Respectfully submitted,

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APPENDIX

SNOWDEN POST CONVICTION RELIEF PETITION
(Excerpt)

VI. THE STATE WAS PERMITTED TO USE EXPERT TESTIMONY TO CORROBORATE THE TESTIMONY OF THE CHILD WITNESSES

Dr. Dorothy Hicks examined both [Leslie] and [Greg] (R 1786). She found no violation of [Leslie's] hymen (R 1799). The doctor further testified that if a penis had been inserted into the vagina there would be some trauma (T 1876). The doctor testified that the findings of her examination of [Leslie] and [Greg] were consistent with the defendant having rubbed his penis in [Leslie's] vagina and anus and consistent with the defendant having placed hi penis in [Greg's] mouth. (R 1823). Such findings could not be supported when there was no physical trauma. The doctor could also not make any conclusions which would identify the defendant as the alleged sexual abuser of [Leslie] and [Greg]. Rather than simply report her medical findings, Dr. Hicks was allowed to vouch for the credibility of he child witnesses and to make conclusions regarding the guilt of the defendant.

Dr. Valerie Rao examined witness Kelly Moran.

Q. (State) Doctor, let me ask you this. Tell the jury what you said of the history of the assault. What questions you asked her, particularly, and what she answered.

A. Okay. The date of the assault was about fifteen months ago. It happened at a babysitting services in Homestead. And the number of assailants was one. He was white and she called him Grant. the attacker was known. (R 1592)

Q. Based upon your experience and expertise, are all the findings that you had in the particular case consistent or

inconsistent with what the victim told you occurred to her?

A. Consistent with. (R. 1597)

Dr. Simon Miranda interviewed [Leslie].

Q. (State) Doctor, when you interviewed Loren and she told you about the incident of sexual abuse, did you find any evidence in your interview that [Leslie] was unable when she described in detail those incidences in detail that she was unable to tell fact from fantasy?

A. I did not.

Q. Did you find any evidence in your interview to indicate to you that when [Leslie Blandes] told you about how she was sexually abused by Grant her babysitter, did you find any evidence to indicate that [Leslie] did not realize the significance of the statement she was making?

A. I did not.

Q. Until your interview of [Leslie Blandes] when she indicated to you that she had been sexually abused by her babysitter Grant, did you find any evidence at all to indicate that her version of the events was contaminated by prior contacts either with Dr. Braga or Howard Pohl?

A. I did not.

* * *

Q. Doctor, is it your testimony that of the thousand children you have interviewed wherein there has been an allegation of sexual abuse on that child that of those

thousand children, 99.9 percent of them did not fabricate the events all by themselves?

A. I think my testimony was that none of them had -- that I had not encountered the experience of a fabrication in the strict sense of the word but that there had been, let's say, made a made-up story with the help of the assistance in the other individuals or one or more individuals that I have seen. (R. 1306)

Drs. Hicks, Rao, and Miranda were allowed to directly corroborate and vouch for the testimony of the child witnesses. An expert witness may not directly vouch for the truthfulness of a witness. *Tingle v. State*, 536 So.2d 202 (Fla. 1988) (error to permit counselor and social worker to testify they believed the alleged child victim was telling the truth); *Davis v. State*, 527 So.2d 962 (Fla. 5th DCA 1988) (reversible error to allow psychologist to testify that alleged child victim was "being frank"); *Norris v. State*, 525 So.2d 998 (Fla. 5th DCA 1988) (reversing sexual battery conviction on effective assistance of counsel grounds where child protection team worker testified without objection that "she had somehow scientifically 'validated'" child witness's testimony and this was the only "evidence" the state had to corroborate child's account). In *Fuller v. State*, 540 So.2d 182 (Fla. 5th DCA 1989), it was error to ask the examining physician of the Child Protection Team to couch for the credibility of the victim.

Q. (by the prosecutor) Dr. Gillis, do you believe [the child] told you the truth or he fabricated the story?

A. I believe [the child] told me the truth.

Q. Why do you say that?

A. I feel that the boy was very composed when he

discussed the history with me. He gave me a very large number of specifics about what happened. I didn't have to pry, so to speak, the information from him. I didn't have to ask his pointed or leading type of questions to invite the answers. He went through these in a very sequential way, used terms I think that were appropriate for perhaps a boy his age. And coupled with what the father told me about the redness around his anus. I feel that the boy was telling the truth.

* * *

Q. Do you have any reason to believe that [the child] lied to you?

A. No, I don't have any reason to believe he lied to me.

540 So.2d at 184

It may be proper for an expert witness to testify that a child was the victim of sexual abuse but it is improper for the expert to testify that it was the defendant who committed the abuse. *Glendening v. State*, 536 So.2d 212 (Fla. 1988). "An opinion as to the guilt or innocence of an accused is not admissible." *Id.* at 221. It is improper for an expert to vouch for the credibility of a witness by stating that the victim's allegation was based on independent recall rather than improper prompting. *See, Batie v. State*, 534 So.2d 694 (Fla. 1988).

The credibility of a witness is the sole province of the jury. Fla. Standard Jury Instructions in Criminal Cases 2.04 Weighing the Evidence. All of the expert witness testimony which vouched for the credibility of the child witnesses was improperly admitted.

When a defendant challenges a conviction based upon the

ineffective assistance of counsel, the court must ask "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695, 80 L.Ed.2d at 698. The case should not be viewed piecemeal as the state might prefer; it must be viewed as a whole. Each point presented and reviewed alone may not amount to a deprivation of a fair trial and ineffective assistance of counsel but when viewed in total the errors do constitute a denial of a fair trial. The post conviction relief form that is included in the rules of criminal procedure contains a list of grounds which an inmate may allege to obtain relief. Fla.R.Crim.P. 3.987. They include "conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant" and"denial of effective assistance of counsel." They also include other issues such as an unconstitutional search and seizure, coerced confession, or double jeopardy. These are the types of issues properly raised on appeal but circumstances are not always such that a defendant can raise these issues on appeal. The Fla.R.Crim.P. 3.850 provides the trial court the opportunity to correct errors which deprived the defendant of a fair trial. The first step is to grant an evidentiary hearing. The record in this case is not sufficient to deny the defendant relief and an evidentiary hearing is required.